

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH EARL ALLEN,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2014

No. 316343

Wayne Circuit Court

LC No. 12-011674-FH

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Kenneth Earl Allen, appeals by right his jury conviction of larceny in a building. MCL 750.360. The trial court sentenced Allen to serve five months to four years in prison. Because we conclude there were no errors warranting a new trial or acquittal, we affirm Allen's conviction. However, because the trial court erred when it scored Allen's sentencing guidelines, we remand for resentencing consistent with this opinion.

I. SUFFICIENCY OF THE EVIDENCE

Allen first contends that there was insufficient evidence to support his conviction of larceny in a building. This Court reviews a challenge to the sufficiency of the evidence by examining the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

On appeal, Allen only challenges the sufficiency of the evidence establishing his identity as one of the men who committed the larceny in a building at issue here. "[I]t is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Identity can be established by either direct or circumstantial evidence. See, e.g., *People v Dunigan*, 299 Mich App 579, 584-585; 831 NW2d 243 (2013).

At trial, Guinevere Abrams and Alissa Caddell testified that they saw two men, wearing hooded jackets and "skull caps," breaking into Taneka Blanding's home and removing televisions and other personal items. Shortly after the commission of the crime, Officer John McKee observed two men fitting the description of the perpetrators only a couple of blocks away from Blanding's home. When officers brought Allen to the scene of the larceny, Blanding told them that she knew Allen as an old family friend and that he was wearing two pieces of jewelry

that were missing from her home. Although Abrams and Caddell could not definitively identify Allen as one of the two men who committed the larceny from Blanding's home, a reasonable jury could infer his identity as one of the perpetrators from the fact that he was taken into custody a short distance from the home only minutes after the larceny and was found in possession of items taken from the home. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992); see also *People v Williams*, 368 Mich 494, 501; 118 NW2d 391 (1962) (holding that there was sufficient evidence to convict the defendants of larceny from a building because the defendants were found in possession of the stolen tires shortly after the offense must have been committed and no one else had access to the car where the stolen tires were found); *People v Tutha*, 276 Mich 387, 395; 267 NW 867 (1936) ("Possession of stolen property within a short time after it is alleged to have been stolen raises a presumption [that] the party in possession stole it, and this presumption is either weak or strong, depending upon the facts.").

There was sufficient evidence to support the jury's finding that Allen was one of the men who committed the larceny at issue.

## II. SENTENCING

Allen next contends that he is entitled to resentencing because the trial court erred in scoring his sentencing variables. When this Court reviews a claim that the scoring of the sentencing guidelines was erroneous, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

### A. PRIOR RECORD VARIABLE 6

Allen contends that the trial court erred in scoring 10 points under Prior Record Variable (PRV) 6. The trial court must score ten points under PRV 6 if the defendant "is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony." MCL 777.56(1)(c). Zero points should be assigned under PRV 6 if the defendant "has no relationship to the criminal justice system." MCL 777.56(1)(e).

At sentencing, the prosecution indicated that Allen had an active warrant in district court for an unrelated home invasion charge at the time he committed the present offense. Allen challenged that assertion on the basis that his wife had found no outstanding charge against him when she went to the district court to investigate. However, at a later postconviction hearing, it was determined that there was an active warrant for Allen in the district court. Eventually, the prosecutor agreed to dismiss the unrelated charges.

In *People v Johnson*, 293 Mich App 79, 88; 808 NW2d 815 (2011), this Court noted its "refusal to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists." In *Johnson*, the defendant had forfeited his bond, and therefore, was not technically "on bond awaiting adjudication or sentencing for a felony" as required by MCL 777.56(1)(c). *Johnson*, 293 Mich App at 88-89. In affirming the trial court's assessment of five points under PRV 6, this Court noted that it was clear the

defendant had some relationship to the criminal justice system, and therefore, points were properly assessed under PRV 6. *Id.* at 89-90. “The continued existence of the prior . . . charge created a relationship with the criminal justice system.” *Id.* at 89.

It is clear that Allen had some relationship to the criminal justice system at the time of his conviction. By Allen’s own admission, the warrant arising out of district court for the unrelated home invasion charge affected his ability to obtain parole. Consequently, under this Court’s decision in *Johnson*, we cannot state that the trial court clearly erred in finding that Allen had an existing relationship with the criminal justice system. *Hardy*, 494 Mich at 438. The trial court properly assessed 10 points under PRV 6.

#### B. OFFENSE VARIABLE 13

Allen next contends that the trial court erred in assessing 10 points under Offense Variable (OV) 13. The trial court must score ten points under OV 13 if “[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property.” MCL 777.43(1)(d). Zero points should be assessed if “[n]o pattern of felonious criminal activity existed.” MCL 777.43(1)(g). “[A]ll crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). “A sentencing court is free to consider charges that were earlier dismissed.” *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013). However, the trial court must find by a preponderance of the evidence that the dismissed offense actually occurred before it can consider that offense. *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

Allen argued at sentencing that he only had one other crime against a person in the five years preceding. The prosecution responded that Allen committed the present offense in 2012, had an outstanding warrant for a home invasion occurring in 2012, and pleaded guilty to first-degree attempted home invasion in 2007. Allen committed this offense in November 2012 and he pleaded guilty to the prior first-degree attempted home invasion charge in January 2007. Even if the prosecution had proved by a preponderance of the evidence that Allen committed the home invasion in 2012 for which the charges were dismissed, Allen’s prior conviction for first-degree attempted home invasion occurred more than five years prior to the commission of the present offense. Therefore, the trial court clearly erred when it counted that conviction.

Additionally, the trial court erred in considering Allen’s existing warrant for home invasion in the district court. Charges that do not result in a conviction may only be considered for assessing points under OV 13 if the trial court finds by a preponderance of the evidence that the dismissed offense actually occurred. *Drohan*, 475 Mich at 142-143. Here, the trial court never considered the facts giving rise to the warrant and did not find that Allen actually committed the offense involved. Therefore, it should not have considered the warrant.

### C. OV 16

Allen next contends that the trial court erred in assessing five points under OV 16. Five points must be assessed under OV 16 if “the property had a value of \$1,000.00 or more but not more than \$20,000.00.” MCL 777.46(1)(c). Zero points are scored if “[n]o property was obtained, damaged, lost, or destroyed or the property had a value of less than \$200.00.” MCL 777.46(1)(e). The victim’s later recovery of the property is irrelevant to the proper scoring of this variable. See *People v Leversee*, 243 Mich App 337, 349-350; 622 NW2d 325 (2000).

In Allen’s presentence investigation report, it was noted that Blanding was seeking \$1,560 in restitution to cover the value of a “Joe Rodeo” watch that was never returned (valued at \$500), the cost of leveling one of the televisions because of damage sustained during the larceny (a cost of \$60), and the cost to repair the base of the damaged television (a cost of \$1,000). However, OV 16 is properly scored in relation to the total value of *all* items “obtained unlawfully.” MCL 777.46(2)(b). Though Allen contests the valuation of these items, the prosecution also presented evidence that Allen had unlawfully obtained two separate flat-screen televisions, a Gucci purse, a Nintendo Wii video game system, and some jewelry. When these items are considered in addition to Blanding’s own statements of loss, the value of the items unlawfully obtained exceeds \$1,000, and therefore, the trial court did not clearly err in finding that the property “obtained, damaged, lost, or destroyed,” MCL 777.46(1), was valued between \$1,000 and \$20,000, MCL 777.46(1)(c). Applying these facts to the law, the trial court properly assessed five points under OV 16. MCL 777.46(1)(c).

### D. OV 10

On appeal, the prosecution argues that there is an alternative basis for affirming Allen’s sentence because he should have been assessed 15 points under OV 10. The prosecution argues that the decision to rob Blanding was based upon Allen’s previous knowledge regarding Blanding, and therefore, constituted predatory conduct. Because this issue was never raised “at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals,” *People v Loper*, 299 Mich App 451, 456; 830 NW2d 836 (2013), this issue is unpreserved for appeal. Unpreserved sentencing issues may be reviewed for plain error. *Id.* at 457.

Fifteen points should be assessed under OV 10 when “[p]redatory conduct was involved.” MCL 777.40(1)(a). Zero points should be assessed when “[t]he offender did not exploit a victim’s vulnerability.” MCL 777.40(1)(d). “ ‘Predatory conduct’ means preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a).

As this Court held in *People v Kosik*, 303 Mich App 146, 159-160; 841 NW2d 906 (2013), “predatory conduct under the statute is behavior that is predatory in nature, precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action.” Here, the prosecution only supports its contention that Allen purposefully victimized Blanding by stating that he had known Blanding for years and would have known that Blanding was a single mother that worked during the day. However, by Blanding’s own admission, Allen and Blanding had not seen each other or interacted in any way for at least a few years prior to the commission of the crime. Further, the prosecution has not shown that the primary purpose of Allen’s actions was to cause Blanding to suffer. *Id.*

Therefore, the trial court correctly found that Allen's conduct was not predatory and properly assessed zero points under OV 10.

Without the 10 points erroneously assessed under OV 13, Allen would only have 5 OV points remaining. This change in scoring of the sentencing variables modifies Allen's minimum sentence range. See MCL 777.68. Because the scoring error affected Allen's minimum sentencing guidelines range, resentencing is required. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

### III. RESENTENCING BEFORE A DIFFERENT JUDGE

Finally, Allen contends that he should be resentenced before a different judge. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Allen never made any mention of the trial judge's bias or inability to maintain impartiality, nor did he move for disqualification. Therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Reassignment is generally required only if the trial judge exhibited "any prejudices or improper attitudes regarding this particular defendant." *People v Hegwood*, 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001). In determining whether to assign resentencing to a different judge, this Court should consider:

- (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected,
- (2) whether reassignment is advisable to preserve the appearance of justice, and
- (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted).]

Allen argues that the trial judge could not reasonably be expected to put out of her mind previously expressed views and findings, and therefore, resentencing should be before a different judge. Allen also argues that the trial judge showed bias in her reliance on subjective conclusions at sentencing and for pressuring him to withdraw his motion for resentencing with the threat of an increased sentence.

In this case, the trial court's errors involved questions of disputed fact, i.e., whether Allen's prior convictions and warrant were sufficient to establish a pattern of felonious activity involving three or more crimes in the previous five years. Nothing about the trial judge's determination regarding the scoring of OV 13 implies that the trial judge will not follow this Court's decision at resentencing. Further, at the hearing on Allen's motion for resentencing, the trial judge did warn that "I could go higher in these guidelines" if Allen wanted to be resentenced. But this statement did not amount to coercion. Rather, taken in context, the remark shows that the trial court was attempting to make it clear that, without resentencing, Allen would likely be granted parole.

Allen has not established grounds for assigning his sentencing to a different judge.

Affirmed, but remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ Kirsten Frank Kelly  
/s/ Michael J. Kelly